IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 191 of 2001
AND
APPEAL FROM ORDER No 192 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

J R ASSOCIATES

Versus

SHASHIKANT CHIMANBHAI PATEL

Appearance:

1. Appeal from Order No. 191 of 2001
MR SB VAKIL for Appellants
MR MIHIR THAKORE for TARESH J BHATTJI for Res. No. 1-6
MR AM KAPADIA for Respondent No. 7 - 13

2. Appeal from Order No. 192 of 2001
MR SB VAKIL for Apellant
MR ND NNANAVATI for T.J. BHATTJI for Res. No.1-6

CORAM : MR.JUSTICE J.R.VORA

Date of decision: /09/2001

COMMON C.A.V. JUDGEMENT

1. Both these Appeals are interrelated and pertains to the same subject matter though have arisen from different orders of separate suits, both the Appeals were heard together and are decided by this common judgement. Learned Advocates of both the sides have agreed to hear both the matters finally. Hence, the matters are decided finally.

2. Brief facts of the case are as under :

2.1 Respondents No. 1 to 6 executed in favour of appellant firm a development agreement-cum-banakhat on 9th August, 1993 in respect of Final Plot Nos. 194, 342 of Town Planning Scheme No.18 and Final Plot Nos. 72, 75, 365, 370 and 383 of Town Planning Scheme No. 19 of the aggregate area of 39,864 sq.mts. because all these lands covered by the Town Planning Scheme in the city of Baroda at Mangalpur and situated in residential zone.

2.2 Regarding execution of development agreement-cum - banakhat on 9th August, 1993, parties i.e. developers appellants herein and land owners who are respondents No. 1 to 6 herein have dispute and have put their own contentions.

2.3 The land developers - appellants herein contended through out that in the earlier part of of the day of 9th August, 1993, the land owners executed the agreement which is placed at Annexure-A of Spl. Civil Suit No. 521 of 2000 and copy of which is placed at page 213 of compilation of Appeal From Order No. 191 of 2001, and along with the same, the land owners also executed in favour of present appellant No.3 - Dineshbhai, a partner of the developer firm, a irrevocable power of attorney on the same day, which is placed at Annexure-B of Spl. Civil Suit No. 521 of 2000. Further, it is the case of the plaintiffs that later on, on the same day i.e. on 9th August, 1993, the land owners had a second thought and got prepared a revised agreement and in the evening of 9th August, 1993, the land owners along with their maternal uncle Manubhai C. Patel and brother-in-law Mahendrabhai, approached the developers - appellants herein with a revised agreement and the agreement executed earlier in the day, which is Annexure-A was abandoned, and the agreement which is placed at Annexure-C of Spl. Civil Suit No. 521 of 2000 was executed and Annexure-C agreement is placed at page 230 of compilation of Appeal From Order No. 191 of 2001.

2.4 For the sake of brevity, all these three documents hereinafter will be referred to as

"Annexure-A", "Annexure-B" and "Annexure-C" respectively.

2.5 The land owners i.e. respondents No. 1 to 6 have their own story to disclose in this respect saying that while executing the document Annexure-A, some papers were got signed by the developers from the land owners and, in fact, only agreement - Annexure-A was executed and agreement Annexure-C was got up and concocted, which never intended to be executed by the land owners.

2.6 The main difference between Agreement Annexure-A and Agreement - Annexure-C is, in Annexure-A agreement, the consideration of the land which would be freehold land, was fixed at Rs.91 per sq.metrs. while in agreement Annexure-C for the freehold land in the T.P. Scheme No. 18, the price was reduced to Rs. 51 per sq. metrs. In addition to this, the land owners were entitled to 40% share in price realised over and above the rate of Rs. 51/- per sq. metrs. and the price of freehold land of T.P. Scheme No. 19 was fixed at minimum of Rs. 21/- per sq. feet and land owners were entitled to 40% share in any higher price realised. In both the agreements, the consideration for the excess vacant land was depending upon the price as might have been fixed by the Competent Authority under the Urban Land (Ceiling & Regulations) Act on sanctioning the scheme which was put up under Section 21 of the said Act.

2.7 The land of the land owners was in excess within the meaning of the Urban Land (Ceiling and Regulations) Act, 1976, necessary declaration was made before the competent authority, and the competent authority under the said Act vide his order dated 27th of December, 1993 held that the land owners were entitled to hold 11999.68 sq. meters as retainable land, and the remaining land out of total 39864 sq. meters, would be an excess land. Meaning thereby that abut 12,000 sq. meters of land out of the land covered by the agreement was declared as retainable land by the land owners while remaining 27864 sq. meters of land was declared as an excess land. The position in pursuance of the above order was as under :

Final Plot No.	Area in square meters			
	Total	Margin	Retainable	Excess
194	1392	128.25	1263.75	--
150	1669	202.50	1466.50	--
342	2313	750.37	1562.63	--
370	318	101.40	206.60	--
365	9650	579.00	1930.00	7141

75	12624	1030.40	--	12624
72	5375	709.48	2998.95	1662.97
383	8206	953.55	--	8206.00
331	2794	222.75	2571.25	--

2.8 It was decided to place a scheme before the competent authority as per Sec. 21 of the Urban Land (Ceiling and Regulation) Act, 1976 which was incorporated in the above agreements.

2.9 On 12th December, 1997, the present appellant firm filed a Spl. Civil Suit No. 820 of 1997 against the present respondents No. 1 to 6 for declaration and permanent injunction basing their suit on Agreement Annexure-C, which was produced on the record of this suit as Mark 4/1 and basing their suit on irrevocable power of attorney to declare that the defendants therein were bound to fulfil all conditions of agreement - Annexure-C dated 9th August, 1993 and the act of the defendants therein to restrain the plaintiffs from exercising their rights under the irrevocable power of attorney and in pursuance of the agreement Annexure-C was contrary to law, and the suit was also filed for the specific performance of the Agreement - Annexure-C, wherein permanent injunction against the present respondents being defendants therein was also prayed for restraining them dealing in respect of the suit lands from selling, transferring, creating any third party rights interfering with the possession of the appellant firm and its partners from exercising the rights under the power of attorney. Along with this suit, an Application - Exh.5 for the temporary injunction also came to be filed by the present appellants - plaintiffs therein to grant ex parte interim injunction restraining the defendants - land owners from dealing in respect of the suit land from selling, transferring, creating any third party rights, interfering with the possession of the appellants firm and from interfering with the appellants firm and its partners from exercising the rights under the power of attorney. The Court on request of the plaintiffs therein appointed the Court Commissioner and a panchnama was drawn of the suit property.

2.10 In the above said Spl. Civil Suit No. 820 of 1997, ad interim injunction was granted by the Trial Court as prayed for above on 15th December, 1997. Urgent show cause notice was issued to the present respondents No. 1 to 6 defendants therein, but even after service of notice and the summons of the suits, respondents herein did not appear in the above said suit and, therefore, the

ad interim injunction granted as prayed for by the plaintiffs came to be made absolute till disposal of the suit by the Trial Court on 10th December, 1998.

2.11 The Urban Land (Ceiling and Regulation) Act, 1976 was repealed on 30th March 1999. Although till the repeal of the said Act, no scheme under Section 21 was approved by the Government for the excess land as declared above nor any price was fixed by the competent authority for the excess vacant land declared under this Act, admeasuring 27864 sq.meters as aforesaid.

2.12 Thereafter, appellant No. 3 herein, the power of attorney holder, vide Annexure-B executed 12 registered sale deeds between 5th November, 1999 and 12th November, 1999 in respect of the excess vacant lands of Final Plots No. 365, 75 and 383 hereinabove. Sale deeds also came to be executed in respect of the excess land of Final Plot No. 72 on 23.10.2000.

2.13 It appears that on 08th March, 2000 Chirag and Amit, sons of respondent No.1 herein filed Spl. Civil Suit No. 205 of 2000 against the plaintiffs herein for the partition of property by metes and bounds of the suit lands. An application Exh. 5 for interim injunction also came to be filed by Chirag and Amit. At initial stage, ad interim order restraining transfer of suit land was granted in favour of Chirag and Amit which was ultimately vacated. The present respondents herein filed reply in the above said suit wherein according to the appellants herein they did not contend that agreement Annexure-C was not executed and the said suit was in respect of agreement Annexure-C.

2.14 About an year and three months after, the order passed by the Trial Judge in Spl. Civil Suit No. 820 of 1997 on 10.12.1998 referred to above, confirming interim injunction in favour of the present appellants was challenged by the present respondents in an Appeal From Order No. 114 of 2000 before this Court along with a Civil Application No. 2072 of 2000 for condonation of delay in filing of the Appeal. The application for condonation of delay was withdrawn by the present respondents stating that the respondents herein have filed the modification application under O.39 R.4 of the Civil Procedure Code of the order passed on 10th December, 1998.

2.15 The present respondents on 20th August, 2000 filed an application at Exh. 31 in Spl. Civil Suit No. 820 of 1997 under Order 39 R.4 of the C.P.C. for

modification of the order passed by the Trial Court below Application Exh.5. Before that, the respondents herein and defendants in the Spl. Civil Suit No. 820 of 1997 filed their reply with an application to take the reply of Exh.5 on record, which was granted, and the reply to the written statement and reply of Exh.5 in Spl. Civil Suit No. 820 of 1997 was taken on record by the Trial Court.

2.16 Simultaneously, plaintiffs - Respondents No. 1 to 6 herein also filed a Spl. Civil Suit No. 521 of 2000 on 17.6.2000 in respect of the same property which is the subject matter of Spl. Civil Suit No. 820 of 1997. In sum and substance, it was prayed that the excess land sold by so called power of attorney holder appellant No.3 herein vide registered deed as said above, after the repeal of the Urban Land (Ceiling and Regulations) Act, 1976 were unlawful, void and not binding to the plaintiffs i.e. respondents herein. It was prayed that the development agreement which is placed at Annexure-C was also void and the defendants therein i.e. appellants herein had no right to deal with the property in pursuance of alleged irrevocable power of attorney because the same was revoked by the land owners. It was also prayed that the land which is declared excess by the competent authority under the Urban Land (Ceiling and Regulations) Act, 1976 was in possession of the plaintiffs respondents herein and the developers appellants herein be restrained from changing or altering the physical conditions of the land in question, and not to act as to destruct the ownership of the land owners. Along with this suit, an application for temporary injunction as Exh.5 also came to be filed for the temporary injunction restraining the defendants from interfering and obstructing in possession of land Final Plot Nos. 365, 75, 383 and Final Plot No. 347, 370, 383 of village Manjalpur, Taluka - District Baroda, which was the excess land as declared by the Urban Land Ceiling authority. Temporary injunction was also sought for restraining the defendants - appellants from changing the physical condition of the land and from transferring the suit land or its part in any manner. Temporary injunction was also sought for restraining the defendants therein appellants herein to proceed ahead with the development procedure in respect of the above said suit land.

2.17 The learned Trial Judge simultaneously decided Application Exh. 5 in Spl. Civil Suit No. 521 of 2000 filed by the present respondents No. 1 to 6 herein and application for modification filed at Exh.31 in Spl.

Civil Suit No. 820 of 1997 for modification under Order. 39 Rule 4 of the Civil Procedure Code of the order passed by the Trial Court in Spl. Civil Suit No. 820 of 1997 on 10th December, 1998.

2.18 Respondents No. 7 to 13 in Appeal No. 191 of 2001 to whom the appellants herein have sold the excess vacant land by registered deeds in pursuance of power of attorney as said above.

2.19 After hearing both the proceedings as said above, learned Trial Judge vide his order dated 17th April, 2000, below Application Exh. 31 in Spl. Civil Suit No. 820 of 1997 filed by the present appellants came to the conclusion that the order passed by the Trial Court in favour of the appellants below Exh. 5 on 10th December, 1998 was required to be modified in the form of clarification that in pursuance of the above said order passed below Exh. 5 in Spl. Civil Suit No. 820 of 1997, the plaintiffs i.e. appellants herein, shall not transfer the excess land in any manner, and shall not make any construction over the excess land. It was further clarified by the Trial Court that the plaintiffs i.e. appellants herein shall not make breach of Condition No.8 of the Agreement - Annexure-C, which was placed at Mark 4/1 in Spl. Civil Suit No. 820 of 1997, and shall observe the same. It was further clarified by the Trial Court that the defendants - appellants herein shall pay actual price of land to the plaintiffs as per agreement Mark 4/1 i.e. Annexure-C. While below Application Exh.5 filed by the present respondents No. 1 to 6 in Spl. Civil Suit No. 521 of 2000, the Trial Judge was pleased to allow Application Exh.5 for the temporary injunction in favour of the present respondents No. 1 to 6 herein to the extent that the defendants appellants herein were directed not to transfer the excess land as mentioned in the suit to any other person in any manner and the appellants - defendants therein were directed not to make any construction over the excess land, not to make breach of Condition No.8, and to observe the same and pay price to the plaintiffs i.e. respondents No. 1 to 6 herein as per Annexure-C.

2.20 Being aggrieved by the above said orders passed by the Trial Court on 17th April, 2001 below Application Exh.5 in Spl. Civil Suit No. 521 of 2000 and below application Exh. 31 for the modification in Spl. Civil Suit No. 820 of 1997, both these Appeals have been filed by the present appellants. Appeal No. 191 of 2001 is filed against the order passed by the Trial Judge below application Exh.5 in Spl. Civil Suit No.521 of 2000

while Appeal No. 192 is filed by the appellants against the order passed by the Trial Judge below Exh. 31 in Spl. Civil Suit No. 820 of 1997.

3. Learned Advocate Mr.S.B.Vakil for the appellants in both the Appeals, learned Advocate Mr. Mihir Thakore for Respondents No.1 to 6 and learned Mr. A.M. Kapadia for Respondents No. 7 to 13 in AO No. 191 of 2001 and learned Advocate Mr. N.D. Nanavati for respondents in AO No. 192 of 2001, were heard.

4. Learned Advocate Mr. S.B. Vakil has urged on behalf of the appellants in both the appeals that the Trial Court has travelled beyond the relief claimed by the land owners. No relief was claimed that the present appellants are bound by Condition No.8 and must act accordingly. Even then, erroneously, the mandatory injunction is granted in favour of the land owners directing the appellants to act as per Condition No.8 Annexure C wherein no obligation at all is cast by such condition No.8 upon present appellants. So far as modification is concerned, there was no case for modification under Order 39 R.4 of the Civil Procedure Code because the latter part of the proviso of Rule 4 provides that, where an order of injunction is passed by Court after giving to a party an opportunity of being heard, the orders shall not be discharged, varied or set aside, except the Court is satisfied that the order has caused undue hardship to that party and that circumstances has necessitated such change or variation. It was urged that the summons and the Notices of Spl. Civil Suit No. 820 of 1997 as well as Application Exh.5 were duly served upon the present respondents No. 1 to 6 but they did not choose to appear and file their reply. Not only that but they preferred an Appeal From order before this Court which was withdrawn. The same was delayed and application for the delay condonation was filed, which came to be withdrawn and, hence, there was no case for the changed circumstances or any hardships, which even after due service of notice, and the summons was not conveyed by the respondents No. 1 to 6 before the Court.

4.1 The learned Advocate Mr. Vakil criticised the approach of the Trial Court, in the order impugned below application - Exh. 31, that suppression is attributed to the present appellants, where there is no suppression at all, and only on this ground, the order dated 10th December, 1998 came to be modified. It was urged that it was not obligatory upon the appellants to state before the Court that earlier to Annexure-C an agreement was

executed because the same was abandoned by respondents No. 1 to 6 and that, the appellants relied on the agreements Annexure-C and the same was pleaded and was relied upon by the plaintiffs and hence there was no suppression of material facts as has been attributed by the Trial Court for the modification of the order dated 10th December, 1998.

4.2 The learned Trial Judge has failed to consider that the land which was declared excess, was transferred and conveyed to respondents No. 7 to 13 of Appeal From Order No. 191 of 2001, by virtue of power of attorney, which was irrevocable, and hence the question of fixing the price as mentioned by the Trial Judge would not have arisen at all. This cannot be labelled as undue transfer under the guise of the order passed by the Trial Court on 10th of December, 1998 in favour of the present appellants.

4.3 The attention of this Court was drawn to the irrevocable power of attorney which is placed at Annexure-B, and according to the learned Advocate for the Appellants, it is clear that unfettered powers are given to Dineshbhai, a partner of the appellant firm for transferring and selling of the land.

4.4 In fact, it was urged that considering the price fixed in both the agreements i.e. Annexure-A and Annexure-C, respondents No. 1 to 6 herein are entitled to more amount in agreement Annexure-C instead of agreement Annexure-A.

4.5 It was vehemently contended that in fact agreement Annexure-C was prepared by the present respondents No. 1 to 6 and with that agreement respondents No. 1 to 6 approached the appellants and appellants had agreed to the agreement at Annexure-C and, therefore, when we compare both the agreements, Annexure-C is more beneficial to the respondents No. 1 to 6 herein and, hence, the contentions put forward by the appellants that agreement - Annexure-C was executed and Annexure-A was abandoned must be treated as genuine. In this respect, Manubhai C. Patel has also filed his affidavit in the Trial Court, which is placed at page No. 341 of the paper book.

4.6 When the suit was filed by the sons of respondents No.1 herein relying on agreement Annexure-C and even though the present respondents filed their reply to this suit, nowhere it was stated that agreement Annexure-A and not Annexure-C was executed and thereby

the respondents herein have not controverted that the agreement - Annexure-C was not executed.

4.7 It was contended that vide agreement Annexure-A or Annexure-C, any of the agreements, ultimately be proved to have been executed, but so far as, the injunction granted in favour of the appellants, this fact did not make any difference because the work of development and selling of land was in pursuance of irrevocable power of attorney - Annexure-B, and so there was no case made out by the respondents No. 1 to 6 of suppression of material fact, and the modification of the order passed on 10th December, 1998 by the Trial Court in favour of the appellants.

4.8 In view of the above contention, learned advocate for the appellants urged that reasoning of the Trial Judge granting Exh. 31 are perverse, more so because an opportunity was afforded for respondents No. 1 to 6 herein to controvert the ex parte injunction granted in favour of the plaintiffs but they did not appear and even withdrew the Appeal From Order and the Application filed for the condonation of delay.

4.9 Criticising the Trial Court, learned Advocate for the appellants contended that the Trial Court said that the Trial Court was not able to decide which one of the agreements i.e. Annexure-A or C was executed. In fact, it was the duty of the Trial Court to decide which of the two agreements was executed and then to decide the issue regarding the modification or granting of the injunction in favour of the respondents No. 1 to 6.

4.10 The order of the Trial Court to pay price to respondents No.1 to 6 as per Condition No.8 of Annexure-C is absolutely perverse, and no such injunction in the mandatory form can be granted in favour of the respondents No. 1 to 6 at this juncture because there was no obligation on the part of developers - appellants herein.

4.11 It was contended that as per the panchnama drawn by the Court Commissioner in Spl.Civil Suit No. 820 of 1997, the possession of the land, including the excess land was with the developers and the developing activity was going on and the construction was also going on.

4.12 It was contended on behalf of the appellants by learned Advocate Mr. Vakil that even if it is held that the agreement - Annexure-A is executed, Clause No. 17 of the Annexure-A clearly indicates that the parties agreed

that in case of repeal of Urban Land (Ceiling and Regulation) Act, 1976, the agreement executed would stand. Meaning thereby that the repeal of the Urban Land (Ceiling and Regulations) Act, 1976, would not make any difference so far as the subject matter of the agreement and so far as the parties are concerned, the agreement was to be performed as per the Condition No.17 mentioned in the agreement - Annexure-`A'. Learned Advocate Mr. Vakil further urges that the appellants do not agree that Annexure-A was executed and Annexure-C was not executed, even then the appellants - plaintiffs in Spl. Civil Suit No. 820 of 1997 are entitled to rely upon the defence provided by the defendants i.e. present respondents herein that Annexure-A was executed, then the appellants i.e. plaintiffs in Spl. Civil Suit No. 820 of 1997 are entitled to rely upon the defence of the defendants and say that even if the Annexure-A was executed, it was agreed between the parties that even if the Urban Land (Ceiling and Regulation) Act is repealed, agreement shall stand as per the terms and conditions of the agreement. Learned Advocate has placed reliance on `head note (b)' of the decision of the Apex Court in the matter of FIRM SRINIVAS RAM v. MAHABIR PRASAD, reported in AIR (38) 1951, 177 to substantiate his contention.

4.13 It was contended that the Court cannot impose upon the developers to pay consideration as has been directed in pursuance of Clause -8 of Annexure-C. Injunction cannot be issued to pay the consideration. The right to develop the land is an important right, according to the learned advocate, this right is given by the agreement Annexure-C to the developers, which cannot be restrained when there is no case that none of both the agreements was executed by respondents No. 1 to 6. As per the agreement for development and for selling the developed units, the period which was fixed was of 10 years. Both the impugned orders of the Trial Court restraining construction and development in pursuance of the execution of one of the agreements is not denial of the right of the Appellants as per the agreement.

4.14 It was contended that the conclusion of the Trial Court that for the excess land, the consideration was not fixed, is erroneous. When Clause -17 of the Annexure-A cast duty upon the parties to continue with the agreement even after the repeal of the Urban Land (Ceiling and Regulations) Act, the consideration accordingly can be objectively fixed by the parties for the excess land and for that, the parties need not go to the Government. It was further contended that if parties fail to fix the consideration for the excess land because of the repeal

of the ULC Act, it is the duty of the court to fix the consideration as per Rule 11-A Sch. I-A of the Urban Land (Ceiling and Regulation) Act, 1976 and, therefore, it cannot be said that the price or consideration for the excess amount is not fixed and hence the agreements were void. It was urged that on this count also both the orders impugned are perverse and erroneous. It was urged that this is the case under Section 21 of the Urban Land (Ceiling and Regulation) Act, 1976 and not under Section 10 of the said Act, where an application for exemption was made and a scheme was to be prepared.

4.15 It was further contended that the power of attorney executed in favour of Shri Dineshbhai, a partner of the appellant firm and the copy of which power of attorney is placed on record as Annexure-B is irrevocable power of attorney because this is the power of attorney with interest in the subject matter. Learned Advocate for the appellants has placed reliance on the decision of this Court in the matter of HER HIGHNESS SHANTADEVI PRATAPSINH RAO GAEKWAD vs. SAVJIBHAI H. PATEL, reported in 1998(2) GLR 1521, wherein it has been established that interest in the property means interest in the subject matter of the agreement. Undoubtedly, in this case, irrevocable power of attorney is simultaneously executed with the agreement - Annexure-C, and for performing the terms and conditions of agreement - Annexure-C and Annexure-C creates an interest in favour of appellants in the subject matter and hence it must be treated as power of attorney with consideration of interest in the subject matter and when such power is made irrevocable, cannot be revoked. It was urged that the irrevocable power of attorney - Annexure-B can be read and understood together with agreement - Annexure-C and not in isolation and so construing power of attorney - Annexure-B, undoubtedly, power of attorney is executed with the interest in the subject matter which is created by agreement Annexure-C and anything is done in pursuance of power of attorney cannot be restrained by any injunction of any court and therefore, also the conclusion of the Trial Court is perverse and erroneous. It was contended that the development was executed in pursuance of not only agreement - Annexure-C but in pursuance of the above said irrevocable power of attorney also and hence construction ought not to have been restrained by the Trial Court and the plot of excess lands sold were also sold in pursuance of irrevocable power of attorney which could not have been questioned by the respondents No. 1 to 6 herein.

4.16 It was contended that respondents No. 1 to 6 herein has no dispute in respect of freehold land which was retainable by respondents No. 1 to 6 as per the order passed by the competent authority under the Urban Land (Ceiling and Regulation) Act. If the agreement is not disputed to the extent of the freehold land then the same agreement cannot be said to have frustrated because of repeal of the ULC Act in respect of excess land. Agreement - Annexure-C specifically provides that the land will be developed and sold as per the terms and conditions of the agreement after the excess land is exempted and relieved by the Government in any manner. It was vehemently therefore contended that since the price for the excess vacant land can objectively be fixed, it cannot by any stretch of reasoning be said that so far as the excess land is concerned, the agreement is frustrated and the performance is not possible and more so when by the same agreement, so far as freehold land is concerned respondents No.1 to 6 herein have no dispute, except whether Annexure "A" was executed or Annexure-"C" was executed.

4.17 It was contended that, in fact, the possession was with the appellants only, the agreement denoting right of entry and the licence is in technical sense. It was contended that the intention of the parties must be looked into in its real sense and in reality the possession of the land was delivered to the developers and development has been carrying on by the appellants and in merely technical sense it was provided in the agreement that the developers had only right of entry on the land in the shape of licence.

4.18 It was vehemently contended that the Development of land including construction was not made contingent or depending upon the happening of the future incident. It was contended that the position as it was on the date of execution of the agreement must be taken into consideration, and on that date, the developers were not to wait for any future happening and hence this contract cannot be said to be a contigent contract in respect of excess land.

4.19 It was also contended that the development has taken momentum on the suit land and some schemes are also floated. The developers of the land as per the agreement did not wait for any incident to happen in the future. It would be clear from the pleadings that from the day of the execution of the contract, the development is a

continuous process in terms of the agreement and the same cannot abruptly be stopped by an order of injunction as has been done by the Trial Court. The agreement, as said above, was not to be closed due to repeal of the Urban Land (Ceiling and Regulations) Act.

4.20 It was contended that as per Sec. 14 of the Specific Relief Act, 1963 clause (3) (c) where the suit is for the enjoyment of contract for the construction of any building or the execution of any other work on land, the contract can be specifically enforced. According to the learned Advocate, this is the contract for the construction of a building, and can be specifically enforced. There is no hindrance at all as the Trial Judge has mentioned in the impugned orders for the specific performance of the contract, as argued above, and, therefore, the Appeals are required to be allowed and both the impugned orders are required to be set aside.

4.21 The Trial Court, in fact, had no jurisdiction to go beyond the interim injunction granted in favour of the appellants because granting the interim injunction as granted by the learned Trial Judge in favour of respondents No.1 to 6 and the order of modification, is granting the suit of the respondents No. 1 to 6 and in view of Order 39 Rule 4 of the Civil Procedure Code, the orders impugned are without jurisdiction. Further, the interim order passed by the Trial Court in Spl.Civil Suit No. 820 of 1997 was operating as res judicata between the parties and estopped respondents No. 1 to 6 from contending other wise than in terms of interim order passed in Spl. Civil Suit No. 820 of 1997.

4.22. On the above mentioned ground, it was ultimately urged on behalf of the appellants in both the appeals that the Appeals be allowed and orders impugned of the Trial Court passed below Application Exh. 5 in Spl. Civil Suit No. 521 of 2000 on 17.4.2001 and order passed below Application Exh. 31 under Order 39 Rule 4 in Spl. Civil Suit No. 820 of 1997 on 10.12.1998 be set aside.

5. Learned Advocate Mr.N.D. Nanavati on behalf of the respondents in Appeal No. 192 of 2001, made out the following contentions.

5.1 It was contended that the application Exh. 28 came to be filed on 7th July, 2000 by the present respondents - defendants in Spl. Civil Suit No. 820 of 1997 for placing on record the written statement and

reply of Application Exh.5, which was allowed by the Trial Court and Application Exh.28 was neither opposed nor controverted by the present appellants and, therefore, after placing on record the written statement and reply to application Exh.5, Exh. 31 came to be filed by the present respondents. Meaning thereby that after stating the full details about the change of circumstances and the hardships caused to the defendants by an order of injunction passed against them, Exh. 31 was preferred and it cannot be said that the same was not maintainable under Order 39 Rul 4 of the Civil Procedure code.

5.2 The power of attorney holder Dineshbhai was not a party plaintiff in that capacity in Spl. Civil Suit No. 820 of 1997 and even then an interim order in his favour came to be passed to the extent that the respondents herein were restrained from obstructing power of attorney holder acting in pursuance of the power of attorney and this fact was required to be brought to the notice of the Trial Court and was brought to the notice of the Trial Court.

5.3 The Urban Land (Ceiling and Regulation) Act, 1976 was repealed on 30.3.1999. That itself is a changed circumstances, entitled the respondents No. 1 to 6 herein to file an application Exh. 31 because under the guise of the interim order passed by the Trial Court in Spl. Civil Suit No. 820 of 1997, the appellants were acting prejudicial to the rights of the respondents No. 1 to 6 herein and beyond the authority of the agreement executed at Annexure-A and the power of attorney at Annexure-B to the extent that it was provided by agreement Annexure-A that the price for the excess land i.e. consideration for the excess land as declared under the Urban Land (Ceiling & Regulations) Act, would be fixed by the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976, and when the Act was repealed in 30th March, 1999, it rendered impossible to have the price of the land i.e. consideration to be adjudicated by the competent authority under the Urban Land (Ceiling and Regulation) Act and, therefore, in respect of the excess land as declared under the ULC Act, the contract was without consideration as the fixing of the consideration was impossible and frustrated, the performance of development agreement also obviously was rendered frustrated and impossible.

5.4 It was contended that so far as the freehold land i.e. retainable land by respondents No. 1 to 6 as declared by the competent authority under the ULC Act is

concerned, the performance of the contract is not much disputed by respondents No. 1 to 6, except the execution of agreements, either Annexure-A or Annexure-C, and it is the stand of the respondents No. 1 to 6 that agreement Annexure-A was executed and not Annexure-C and, therefore, the consideration of the freehold land was agreed according to agreement Annexure-A i.e. Rs. 91 per sq. meter.

5.5 It was contended that the Court may come to any conclusion that either agreement Annexure-A or Annexure-C was executed, but so far as, excess vacant land under the Urban Land (Ceiling and Regulations) Act is concerned, Annexure-A or Annexure-C, any of the agreements in future ultimately is proved to have been executed, the performance becomes impossible for the simple reason that in both the agreements the base for the consideration of the excess land is depending upon the adjudication of the price of the land by the competent authority as per Rule 11-A SCH. I-A of the Urban Land (Ceiling and Regulations) Act, 1976, in pursuance of a scheme which might have been approved by the Government under Section 21 of the Urban Land (Ceiling and Regulations) Act. Therefore, it is contended that so far as the performance of the contract in respect of the excess land is concerned, it would be impossible because any of the agreements "A" or "C" is proved to be executed, then also in both the agreements it is provided that the consideration for the excess land would be as aforesaid.

5.6 It was also contended that since performance of the agreement in respect of the excess land is frustrated, the power of attorney which is simultaneous to agreement cannot operate beyond the agreement executed because the power of attorney is part and parcel of the agreement. It was contended that so far as the excess land is concerned, the alleged irrevocable power of attorney was revoked but other wise also reading both the documents together the power of attorney since the performance of the contract in respect of the excess land was impossible would not have acted beyond the scope of the agreement so as to deal with the excess land as declared by the Urban Land (Ceiling and Regulations) Act. The power of attorney holder who was not a party in Spl. Civil Suit No. 820 of 1997, after repealing of the Urban Land Ceiling Act rendering the performance of the agreement impossible, acted beyond the authority of agency and sold some of the excess lands to the family members of the appellants which entitled the respondents No. 1 to 6 to file an application Exh. 31 because of this changed circumstances, which was rightly allowed by

the Trial Court.

5.7 It was contended that the Trial Court was given an impression that the whole amount of consideration of the agreement was paid by appellants to Respondents No. 1 to 6 which is stated in Spl. Civil Suit No. 820 of 1997 to be about 35 lacs, but as stated, vide Application - Exh. 31 and pleadings of Spl. Civil Suit No. 521 of 2000, the amount even as per Annexure-C was to the tune of Rs. 77 lacs and hence the appellants herein had not performed their part of contract fully. In these circumstances, the interim relief came to be granted by the Court in favour of the plaintiffs i.e. appellants herein, which was required to be modified and, ultimately, rightly modified by the Trial Court by Application - Exh. 31.

5.8 Learned Advocate Mr. Nanavati has placed heavy reliance on the decision of the Apex Court in the matter of HER HIGHNESS MAHARANI SHANTIDEVI P. GAIKWAD vs. SAVJIBHAI HARIBHAI PATEL, reported in 2001(2) GLH 140, wherein the Supreme Court has settled principle for granting specific performance or refusing specific performance of a contract, in similar circumstances, which have arisen in this case, and by that, it was contended that by this decision of the Apex Court, the decision of the Division Bench of this Court in the matter of HER HIGHNESS SHANTADEVI vs. SAVJIBHAI H. PATEL, reported in 1998 (2) GLR 1521 is overruled and the decision of this Court was set aside, on which, the learned Advocate for the appellants has placed reliance. Therefore, it was ultimately urged that both the Appeals for the above mentioned reasons be set aside.

6. Learned Advocate Mr. Mihir Thakore mainly contended that after obtaining ex parte interim order, the present appellants negotiated compromise talks and in pursuance of the compromise talks there was a public notice and, therefore, the present respondents No. 1 to 6 could not appear before the learned Civil Judge (SD) in Spl. Civil Suit No. 820 of 1997. According to learned Advocate, on 6th December, 1998, a public notice was issued to cancel the power of attorney given to Dineshbhai. Thereafter also, there were talks of compromise and during this period the excess land was sold on cancelled power of attorney by the appellants herein and hence the application for modification of the interim injunction granted by the Trial Court in Spl. Civil Suit No. 820 of 1997 was filed.

6.1 At first instance, Mr. Mihir Thakore vehemently

urged that it could have been only Annexure-A, which would have been executed and not Annexure-C. He submitted reasons for that also that the language of power of attorney and Annexure-A tallies with Annexure "B", Power of Attorney. While, the language of Annexure-B and Annexure-C is not tallying. The learned advocate Mr. Thakore also submitted that respondents No. 1 to 6 have not executed Annexure-C though it is pretended that Annexure-C is beneficial to the appellants but Annexure-C is not beneficial to the respondents No. 1 to 6. Comparison, according to Mr.Thakore, denotes that so far as freehold land is concerned, the price of the land is mentioned in Annexure-A is Rs. 91 per sq. meter while in Annexure-C the price is much less. The price of the excess land is shown by fabricated figures higher, but the price for the excess land cannot be determined as has been determined by the appellants herein.

6.2 Learned Advocate Mr. Thakore vehemently placed reliance on conditions mentioned in both the agreements that the excess land was to be sold at the price determined by the Government and price can be determined only when the scheme is approved. Before approving of the Scheme and the Government determines the price of the excess land, the Urban Land (Ceiling and Regulations) Act came to be repealed and, therefore, the whole contract so far as it relates to the excess land would be frustrated and, hence, the question of development on the said land and selling of the said land by alleged power of attorney holder would be illegal on the part of the appellants.

6.3 Learned Advocate for the respondents No. 1 to 6 refers Section 54 of the Transfer of Property Act wherein a specific provision has been made that an agreement to sell would not create any interest in the property and hence it is urged that the power of attorney though it is mentioned therein that the power is irrevocable but cannot be irrevocable because any interest as per Section 202 of the Contract Act was not created in the property. The appellants herein are given only development rights and even possession was also not handed over to the present appellants.

6.4 It was urged that the power of attorney Annexure-B could be read along with Annexure-A only and when the contract in respect of the excess land is frustrated on account of repealing of the Urban Land (Ceiling & Regulations) Act, the authority to sell the land or to deal with such excess land given in the power of attorney - agreement - Annexure-B comes automatically

to an end.

6.5 The ex parte injunction granted in favour of the appellants in Spl. Civil Suit No. 820 of 1997 was the result of the compromise talks between the parties and, therefore, the respondents No. 1 to 6 did not remain present in the suit and, therefore, the learned Judge was right in granting ad interim injunction in favour of the present respondents No. 1 to 6 in Spl. Civil Suit No. 521 of 2000 with the modification in earlier orders passed in Spl. Civil Suit No. 820 of 1997. The excess land which is sold by the power of attorney holder to the family members of the appellants is at very meagre price when at the relevant juncture price of the land was much higher which itself denotes that each transfer was fraudulent.

6.6 Learned Advocate Mr. Thakore contended that even if for the sake argument if it is taken that Annexure-C was executed, even then so far as the excess land is concerned, the price which was determined by the Government in pursuance of Sec. 21 of the Urban Land (Ceiling and Regulations) Act, 1976 could not be determined because of repeal of the ULC Act. Therefore also, the contract stands frustrated.

6.7 Learned Advocate Mr. Thakore has placed reliance on Section 32 and 56 of the Contract Act and urged that when consideration which is essential ingredients of the contract, cannot be determined, the performance of contract itself becomes impossible and the parties are absolved from further performance of it. If the event becomes impossible, such contracts become void.

6.8 It was urged by learned Advocate Mr. Thakore that condition as per agreement - Annexure -C, the appellants, who are developers, in pursuance of the licence, were permitted to enter into the land and develop the same. The possession of the land was never handed over to the present appellants. The possession of the excess land is with respondents No. 1 to 6 respectively and in view of the documents executed by the power of attorney holder at the interim stage, it was absolutely necessary to restrain the appellants from dealing with the property.

7. From the rival contentions and from the records available with this Court, the controversy which it

appears is in respect of the excess land which is about 27864 sq. meters as declared by the competent authority under the Urban Land (Ceiling and Regulations) Act. From the above, the following points, at this interlocutory stage, are required to be answered and decided in these Appeals.

(i) Whether there were changed circumstances in favour of the present respondents No. 1 to 6 within the scope of Order 39 Rule 4 of the Civil Procedure Code to modify the order passed by the Civil Judge (SD) below Application Exh.5 in Spl. Civil Suit No. 820/97 dated 10th December 1998 granting interim injunction relief in favour of the appellants as aforesaid?

(ii) Whether learned Judge committed any error in modifying the above order by impugned order passed on 17.4.2001 below Application - Exh.31 in Spl. Civil Suit No. 820 of 1987?

(iii) Whether present respondents No. 1 to 6 in both the Appeals were required to be protected by impugned order of temporary injunction?

(iv) Whether the learned Trial Judge erred in granting temporary injunction in favour of respondents No. 1 to 6?

8. In both the appeals, above said four points will have to be decided and considered together because the genesis of the dispute is the contract which is pleaded by the parties. At this interlocutory stage prima facie it will have to be ascertained whether Court is likely to grant specific performance of such contract, as has been sought for by the appellants and which is the core controversy between the partes.

9. In this respect main controversy amongst the litigating parties is whether Annexure-A was executed or Annexure-C was executed. The learned Trial Judge observed that from the record and evidence available, it was not possible for him to decide which of the two contracts was executed between the parties. The amount of consideration differs in both the contracts. I cannot agree with the submission of the learned Advocate Mr. S.B. Vakil that the Court ought to have decided at that stage which of the two contracts was executed. Because without adducing evidence at the interlocutory stage, it was really difficult for the Trial Court to decide which of the two agreements was executed. However, the dispute

is in respect of the excess land admeasuring 27864 sq. meters as declared by the Urban Land (Ceiling and Regulations) Act, 1976. So far as freehold land is concerned there appears a dispute only upto the extent of amount of consideration fixed by the contract. Except this, so far as the freehold land is concerned, there appears no dispute between the parties. This is so because if ultimately, it is held that the Annexure-A was executed, the amount of consideration would be higher, and if Annexure-C is held to be ultimately executed, the amount of consideration may be less than Annexure-A. This can be decided finally in the Suit when parties will be at liberty to adduce evidence and a competent court will decide the same, so far as the free hold land is concerned anything remains due or nothing remains due from appellants so far as respondents No. 1 to 6 are concerned. But the controversy in these Appeals is whether the contract either it is contained in Annexure-A or Annexure-C is whether specifically enforceable or is such that the specific performance of which cannot be granted to the appellants.

10. Facts of the case and admitted facts go to suggest that after the execution of the contract, be it Annexure-A or Annexure-C, ultimately, it was to be decided by the Competent Authority, Urban Land (Ceiling and Regulations) Act, 1976, that what would be the selling price of the excess land. The consideration of contract was depending upon the fixation of price by such authority. Though both the agreement - Annexure-A and Annexure-C provide different modes for ascertaining consideration of contract in respect of excess land but in both the modes ascertaining of consideration for the excess land is depending upon the fixation of price by the Competent Authority under ULC Act as per Section 21. In Annexure-A, it is specifically provided in condition No.1 that the consideration of freehold land would be Rs. 91 per sq. meter while consideration of excess land would be fixed according to the adjudication by the Government as per Urban Land (Ceiling and Regulations) Act. While Annexure-C also states that the excess land as might be granted by the Government under Section 21 of the Urban Land (Ceiling and Regulations) Act, 1976 or might be granted by other provisions of law, would be sold at the market price prevailing at that time, and out of that price, the price as may be determined by the Government under Section 21, would be paid to the land owners and the remaining excess price would be distributed equally between the land developers and the

land owners. These conditions in the contracts, irrespective of the fact that which agreement was executed i.e. Annexure-A or Annexure-C leads us to the only conclusion that so far as the excess land is concerned, the consideration was not fixed because when the documents were executed, the Urban Land (Ceiling and Regulations) Act, 1976 was in force and it was decided to apply to the Government under Section 21 for the exemption of the excess land and, therefore, it was decided by the parties that the land owners would be entitled to the consideration in respect of the excess land as might be decided by the Government under Section 21 of the Urban Land (Ceiling and Regulations) Act, 1976. The said Act was repelled on 30th March, 1999. The authorities naturally which were required to adjudicate the price of the excess land after approving of the scheme became functus officio. The agreements without consideration are not contracts at all. It is the settled principle of law that if the fixation of consideration is depending upon the happening of any future incident, and if that future event becomes impossible, the fixation of consideration also becomes impossible rendering the contract frustrated as per Sections 34 and 56 of the Indian Contract Act. Therefore, there is substantial force in the argument advanced on behalf of the land owners i.e. respondents No. 1 to 6 herein that the specific performance of the contract in respect of the excess land, for which also the Spl. Civil Suit No. 820 of 1997 has been filed, has become unenforceable, and at this juncture, it can be said that the court is not likely to grant specific performance of such contract wherein consideration is not fixed or the fixation of consideration has become impossible. So far as the excess land is concerned, reading both the documents as a whole, it clearly appears that the development could have started only after the scheme under Section 21 is approved. Power of attorney holder Dineshbhai appellant No.3 applied before the authority for exemption of the land declared under the ULC Act for putting up a scheme. In my humble view, the development could have taken place only when the scheme would have been approved by the competent authority, but before that i.e. on 30th March, 1999, the Urban Land (Ceiling and Regulations) Act, 1976 was repelled and the scheme could not be approved or the price could not be fixed. I cannot agree with the argument advanced by learned advocate for the appellants that the price of the land could objectively fixed and for that the parties need not go to the Government. If this is not possible, then, according to the learned Advocate for the Appellants, the court can fix the price as per the

provisions of the Urban Land (Ceiling and Regulations) Act. Firstly, at this interlocutory juncture, suffice it to say that, the fixation of price for the excess land in pursuance of the scheme approved under Section 21 would be under Rule 11-A of Sch.I-A of the Urban Land (Ceiling and Regulations) Act, which denotes the provision that before fixing of the price, the land owners will be required to be heard and appear before the competent court, and particularly item No.4(1) of Sch.I-A is relevant for the present purpose, which is reproduced hereunder :

Rule 11-A [Schedule I-A (4) :

(1) The dwelling units constructed under the scheme shall be sold by outright sale or on hire-purchase or shall be let out on rent to the weaker sections of the society.

(2) Where any dwelling unit is sold by outright sale, the sale price which such person shall be entitled to receive shall not exceed a sum consisting of -

(i) the actual cost of construction of the dwelling - unit;

(ii) either ten times the net average annual income actual derived from the land for the period of five consecutive years referred to Cl. (a) of sub-section (1) of Sec. 11 or five times the amount he would be entitled to under Cl.(b) of sub-section (1) of that section, whichever is higher, in respect of the land occupied by such dwelling - unit and the land appurtenant, if such land is deemed to have been acquired by the State Government under sub-section (3) of Sec. 10; and

(iii) a sum calculated at the rate of fifteen per cent on cost of construction and such cost of land referred to in (ii) above.

(3) Where any dwelling unit is sold on hire purchase, such person shall be entitled to get in addition on the sale price determined in accordance with sub-paragraph (2), interest calculated at the rate of ten per cent per annum

on the unpaid portion of the sale price.

(4) Where any dwelling units is let out on rent, the rent shall be worked out in such a way that such person would get a return not exceeding ten per cent per annum on the sale price of the dwelling unit determined in accordance with sub-paragraph (2).

11. The above provision clearly denotes that the court will have to supervise so many details on fixing the price, and that duty cannot be cast upon the court. The duty, on the court, is cast to enforce if law permits the valid contract executed by the parties. Fixing of consideration between the parties would amount to execution of a contract and court cannot call upon to do that. As stated above, in view of the provisions of the Urban Land (Ceiling and Regulations) Act, the consideration for the excess land cannot be fixed objectively and hence for want of consideration till the dispute is decided ultimately by the competent court, at this interlocutory stage, it can be said that this is the contract in which the court would not grant specific performance and there remains the prima facie case of the present respondents No.1 to 6 in Spl. Civil suit No. 521/2000, protecting the respondents No.1 to 6 and protecting the excess land to be transferred from hand to hand or from changing hand to hand so as to destruct the ownership of the land which is of the present respondents No. 1 to 6. Therefore, the learned Trial Judge has not committed error in granting protection to respondents No. 1 to 6 by way of interim injunction vide his order passed in Spl. Civil Suit No. 521 of 2000 which is impugned in Appeal From Order No. 191 of 2001.

12. The fact which is required to be considered is whether the learned Trial Judge was correct in modifying the order passed in favour of the present appellants below application - Exh.5 in Spl. Civil Suit No. 820 of 1997. Along with this fact, it will have to be considered at this interim stage that whether power of attorney which is at Annexure-B continued to authorise appellant No.3 to sell the excess land. The Apex Court in H.H. MAHARANI S.P. GAIKWAD vs. S.H. PATEL, reported in 2001 (2) GLR 140, observed that in S.Chattanatha Karayalar vs. The Central Bank of India & Ors., as reported in (1965) 3 SCR 318, quoted the observations of Moulton, L.J. in Manks vs. Whitely, which is as under :

" Where several deeds form part of one

transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole."

Therefore, Annexure-B, power of attorney will have to be read along with the agreement, either it may be Annexure-A or Annexure-C, as said above. So far as the excess land is concerned, prima facie, at this juncture it appears that the contract in respect of excess land being without consideration is frustrated for which the Court ultimately may not grant specific performance. Now taking into consideration the above observation of the Apex Court, power to sell excess land, contract of which is frustrated would not be continuing. Secondly, though the Annexure-B is said to be an irrevocable power of attorney as has been mentioned in the body of the power of attorney, it will have to be considered whether the said power of attorney is irrevocable or not. The issue is directly covered by a decision of the Supreme Court in the matter of H.H. Maharani S.P.Gaikwad (supra), wherein in exactly similar circumstances, the Apex Court while setting aside a decision of a Division Bench of this Court with reference to the irrevocable power of attorney observed in para 48 as under :

"xxxxxxx It is not a case of agency coupled with interest. No interest can be said to have been created on account of plaintiff being permitted to prepare the scheme and take ancillary steps. Plaintiff could not get possession before declaration under Section 21 of the ULC Act.xxxxxxxx"

That was a case of similar nature, wherein the development agreement was executed between the parties. A power of attorney coupled with the development agreement was executed and also the agreement was made consideration for the power of attorney. Same is the case in the present matters and in those circumstances Apex Court observed that such power of attorney would not create any interest in the property or subject matter of the agreement so as to invite Sec. 202 of the Indian Contract Act. Meaning thereby that Annexure-B when reading with Annexure-A or Annexure-C, cannot be said to be a power of attorney creating interest in the subject

matter. Mere permission to enter in the property and to do development work is not creating interest in the property. Reading both the documents at Annexure-A and Annexure-C, it is clear that both these documents, right to develop the land was granted to the present appellants and only after that development, the dwelling units on the land was to be sold to the purchasers and the developers i.e. present appellants were to sign such sale documents as confirming party and the possession of such dwelling units or the land was to be given by the land owners i.e. present respondents No. 1 to 6 to the purchasers. Therefore, the power of attorney Annexure-B cannot be said to be the power creating interest in the subject matter and irrevocable. The contentions of learned Advocate Mr. S.B. Vakil in this respect cannot be accepted. This power of attorney, which is Annexure-B was revoked by present respondents No.1 to 6 on 6.12.1998. However, on the strength of this power of attorney and after repealing of the Urban Land (Ceiling and Regulations) Act, Appellant No.3 Dineshbhai sold some excess land to the family members of the appellants. These were the circumstances, undoubtedly, affording ground for filing an application under Order 39 Rule 4 of the Civil Procedure Code, to the present respondents No. 1 to 6. There were changed circumstances, as mentioned above, necessitating the modification of the order impugned passed in favour of the appellants in Spl. Civil Suit No. 820 of 1987 and therefore, it cannot be said that there were no circumstances or occasion for the present respondents No. 1 to 6 which entitled the present respondents No. 1 to 6 to file an application for modification.

13. Lastly, it has been contended by learned Advocate Mr. S.B. Vakil that as per Section 14 of the Specific Relief Act, Sub-sec.(3) Clause (c) where the suit is for the enforcement of contract for the construction of any building the same can be specifically enforced. The Apex Court in H.H. Maharani S.P. Gaikwad v. S.H. Patel (supra) in para 46 has observed in the similar circumstances and almost all same kind of contract that "a bare reading of Clause (c) of Section 14(3) shows that it has no applicability. The building contract stipulated by Clause (c) of Section 14(3) is not the type of the contract with which we are concerned in the present case." The contract which was before the Supreme Court in the above decision was a contract similar to the agreements in this case where Section 14(3)(c) of the Specific Relief Act, 1963 would not be applicable. Other wise also, the plain reading of the Section 14(3)(c) denotes that duty is cast upon the contracting party on

whom the execution of such contract is cast and the remedy is available to other party of the agreement. Therefore, when the nature of the contract herein is altogether a different, the clause 14(3)(c) of the Specific Relief Act, 1963 will have no application in this case.

14. So far as the possession of land is concerned, as aforesaid in Annexure - A and Annexure-C, in both the documents, the provisions are made that the present appellants will have a right only to enter in the premises by way of licence and to develop the land at their own expenses. This cannot be said to be handing over the possession of the property to the appellants. The panchnama drawn by the Court Commissioner appointed by the Court in Spl. Civil Suit No. 521 of 2000, will not be useful to the appellants because the presence of the appellants on the suit land and the execution of the development work on the suit land was permitted by the agreement by way of licence only. This cannot be construed in the technical sense because as said above the provisions are also made in the agreement at Annexure-A and Annexure-C that after completing the development work, the dwelling units on the land will be sold to the purchasers and developers i.e. present appellants will sign such documents as confirming party and the possession of dwelling units or the land will be given by the land owners - present respondents No. 1 to 6 to the purchasers. Therefore, the intention of the parties was that the developers were granted the licence only to enter on the land in question and to perform the development work. Therefore as contended by learned Advocate for appellants on account of possession, the present case is not distinguishable from the case of the Apex Court as cited by the respondents No. 1 to 6 i.e. in the matter of HER HIGHNESS MAHARANI SHANTIDEVI P. GAIKWAD vs. SAVJIBHAI HARIBHAI PATEL & ORS., as reported in 2001(2) GLH 140. In the similar circumstances, the Apex Court in the above said judgment observed in Paras 57, 58 and 60 as under:

> "57. It was further contended by Mr. Nariman that the agreement is not specifically enforceable also in view of Clause (d) of Sub-section (1) of Section 14 of the Specific Relief Act, 1963. This provision provides that a contract the performance of which involves the performance of a continuous duty which the court cannot supervise, is not specifically enforceable. There is

considerable force in the submission of learned Counsel. Even the High Court had substantially proceeded on the basis that the implementation of the scheme may require supervision but held that it can be supervised by the competent authority. Having regard to the nature of the scheme and the facts and circumstances of the case, to our mind it is clear that the performance of the contract involves continuous supervision which is not possible for the court. After repeal, such continuous supervision cannot be directed to be undertaken by the competent authority as such an authority is now non-existent.

58. The grant of decree for specific performance is a matter of discretion under Section 20 of the Specific Relief Act, 1963. The court is not bound to grant such relief merely because it is lawful to do so but the discretion is not required to be exercised arbitrarily. It is to be exercised on sound and settled judicial principles. One of the grounds on which the court may decline to decree specific performance is where it would be inequitable to enforce specific performance. The present is clearly such a case. It would be wholly inequitable to enforce specific performance for (i) residential houses for weaker sections of the society cannot be constructed in view of the existing master plan and, thus, no benefit can be given to the said section of the society; (ii) in any case, it is extremely difficult, if not impossible, to continuously supervise and monitor the construction and thereafter allotment of such houses; (iii) the decree is likely to result in uncalled for bonanza to the plaintiff; (iv) patent illegality of order dated 20th June, 1998; (v) absence of law or any authority to determine excess vacant land after construction of 4356 dwelling units; and (vi) agreement does not contemplate the transfer of nearly 600 acres of land in favour of the plaintiff for construction of 4356 units for which land required is about 65

> acres. The object of the Act was to prevent concentration of urban land in hands of few and also to prevent speculation and profiteering therein. The object of Section 21 is to benefit weaker sections of the society and not the owners. If none of these objects can be achieved, which is the factual position, it would be inequitable to still maintain decree for specific performance.
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> 60. It also deserves to be noticed that, strictly, it is not a contract for transfer of the property but is a contract to carry out the scheme which is incapable of being carried out at this stage on account of reservation in the master plan and also repeal of the ULC Act. It was not and cannot be the case of the plaintiff that in case the scheme had been carried out, he would have enjoyed the property. He would have only enjoyed the specified profits. At best the plaintiff could pray for damages. In the plaint, it was asserted that Rs. 16,75,000/- was spent on execution and/or implementation of the scheme. The plaintiff, for reasons best known to him, has not sought a decree for any damages, even as an alternate relief."

15. In the present case also, since the scheme is not approved, no dwelling houses can be constructed on the land which is declared as excess land. Section 21 of the ULC Act provides accommodation of the weaker sections of the society and because the ULC Act is repealed, it would also extremely difficult to the extent that it is impossible to fix the consideration for the excess land by the court or by the competent authority. The beneficial purpose of the Urban Land (Ceiling and Regulations) Act cannot therefore be achieved that is to provide accommodation to the weaker sections of the society. If the rates which has been proposed by the appellants for the excess land on assumption that Government would have determined that rate, then the same would be uncalled for bonanza for the present appellants and hence it clearly appears at this interlocutory stage that till final decision on merits of both the suits, the court may not grant the specific performance of the contract which would not only inequitable but illegal as

the contract without consideration cannot be specifically enforced. In this view of the matter both the orders passed by the learned Trial Judge requires no interference at all.

16. The decision of the Supreme Court in H.H. Maharani S.P. Gaikwad v. S.H. Patel (supra) is fully applicable to the facts of the present case. In the case before the Supreme Court (supra) the contract was impossible because there was change in the master plan and the repeal of ULC Act. While in this case so far as the excess land is concerned, the consideration for the contract is not determinable because of the repeal of the ULC Act and, therefore, contract appears not to be specifically enforceable. In this case also for the development of the excess land, the court would require to supervise many details. Before the case of the Supreme Court, the scheme was approved. While in the present case, the scheme was not approved and ULC Act came to be repealed. Even in a case where the scheme was approved, the Apex Court observed that the contract was not enforceable because even if the contract is allowed to be performed as per the scheme approved, then also, the Court will have to supervise many details, which Court cannot do. While in this case, the original contract was to develop the excess land as per Section 21 of the ULC Act, and the scheme was never approved and now if the parties are allowed to develop the land dehors the agreement in the manner that as per the scheme approved by the authorities under Section 21 of the ULC Act, would amount to execute a new contract between the parties. Therefore also, at this juncture, it clearly appears that the agreements either Annexure-A or Annexure-C whichever is ultimately held to be executed, at this interim stage appears, that is the contract for which the Court is not likely to grant specific performance and for these reasons also, the order impugned in both the Appeals require no interference because they are to last till the final disposal of the suit and till then i.e. upto the final disposal of the suit in the above mentioned circumstances and on above facts the land owners if not protected as has been protected by the Trial Court, then irreparable injury is likely to be caused to the land owners.

17. Learned Advocate for the appellant Mr. S.B. Vakil has expressed the grievance against the order passed by the learned Trial Judge to the extent that the learned Judge has wrongly directed the appellants to perform and observe Condition No.8 of the agreement Annexure-C . It is clear that it is the say of the

appellants that agreement Annexure-C was executed and not Annexure-A. It appears that therefore the Court passed the order that till final disposal of the suit if Annexure-C is executed as per the say of appellants, then also, the present appellants are bound to adhere Condition No.8 of Annexure-C because it clearly appears that this is in respect of freehold land wherein even as per Annexure-C also the consideration is not fully paid by the appellants. This is so because one who seeks equity must do equity. Appellants contended that Annexure-"C" was executed, and specific performance is sought for appellants must also ready and willing to perform their part of contract and in these circumstances the Court directed them to pay price as per Condition No.8 of the Annexure-"C". It must be understood in respect of freehold land, because learned Trial Judge has come to the conclusion that the price for the excess land has not been fixed. The contention of Mr. Vakil cannot be accepted on the ground that no obligation is cast upon appellants by Condition No.8, but Condition No.8 in uncertain terms states that the land owners are entitled to the consideration of the land as mentioned in this agreement Annexure-C and this consideration is to be paid by appellants. Therefore, at this juncture till finalisation of both the suits, no interference is required in this direction of the Trial Judge.

18. In view of the above discussion, no interference is called for in both the impugned orders in Appeal From Orders No. 191/2001 and 192/2001. In the result, Appeal From Order No. 191 of 2001 as well as Appeal From Order No. 192 of 2001 stand dismissed with no order as to cost. However, learned Trial Judge is directed to expedite the disposal of Special Civil Suit Nos. 521 of 2000 and 820 of 1987 and to dispose of both the suits according to law as expeditiously as possible but not later than within six months from the date of receipt of the writ of this order. Office is directed to transmit the writ of this order immediately to the Trial Court.

19. Record of the Appeals reveal that implementation and operation of both the impugned orders passed on 17th April, 2001 by the Trial Court below Exh.31 in Spl. Civil Suit No. 820 of 1997 and below Exh.5 in Spl. Civil Suit No.521 of 2000 were stayed by the Trial Court, and the order of the Trial Court staying operation and implementation of the impugned order was extended by this Court vide order dated 13rd June, 2001 in both the Appeals. The said interim relief granted on 13th June, 2001 was extended till further orders vide order of this Court on 18th June, 2001 in both the Appeals. In this

view of the matter in both the Appeals the interim relief which is operating today as aforesaid is extended for a further period of four weeks from today in case the Appellants herein intends to approach higher forum.

20. In view of the above, both the Civil Applications being C.A. No.5897 of 2001 in A.O. No. 191 of 2001 and C.A. No. 5901 in A.O.No.192 of 2001 shall stand disposed of accordingly. No order as to costs.

(J.R. Vora, J.)

p.n.nair